

ICWA Issues in Adoption Cases

Judge Melvin R. Stoof
Pascua Yaqui Court

Arizona Law Against Racial Preferences, A.R.S. § 8-105.01

- “This section does not apply to the placement or adoption of children pursuant to the Indian Child Welfare Act.”

Arizona Courts must make inquiry whether ICWA applies.

- “At the beginning of any court proceeding. . . the Court shall inquire if any party has reason to believe that any child who is subject to the proceeding is subject to the Indian Child Welfare Act of 1978. . . [If so] . . “the Court and parties shall meet all requirements of the Act that are not prescribed by this chapter.” A.R.S. § 8-815(A) & (B).

Arizona's consent to adoption statute is subject to ICWA A.R.S. § 8-106.

- “The Indian Child Welfare Act may supersede the Arizona Revised Statutes regarding adoption and paternity.” *Id.* at sub. §(I)(9).

Under ICWA “child custody proceeding” includes Adoptions

- “Child Custody Proceeding” shall mean and include -
 - . . .(iv) “adoptive placement” which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.” 25 U.S.C. § 1903.

Foster Care Preferences, 25 U.S.C. § 1915(B)

- “Pre Adoptive” Placement Preference:
 - A member of the Indian Child’s extended family;
 - A foster home licensed, approved or specified by the Indian child’s Tribe;
 - An Indian foster home licensed or approved by and authorized non-Indian licensing authority;
 - An institution for children approved by an Indian Tribe or operated by an Indian organization that has a program suitable to meet the child’s needs.

ICWA Adoption Preferences

25 U.S.C. § 1915(a).

- Absent good cause to the contrary, preference in adoptive placement must be given to:
 - A Member of the child's extended family;
 - Other members of the child's tribe;
 - Other Indian families.

Voluntary Consent to Termination of Parental Rights or Adoptive Placement, ICWA § 1913(c); (See form)

- Must be in writing and recorded before a judge of a court of competent jurisdiction;
- Judge must certify that the terms and consequences of the consent were explained in detail and were fully understood by the parent or Indian custodian
- Judge must certify that the Indian parent or custodian fully understood the explanation in English or that it was interpreted into a language that the parent or custodian understood.

Voluntary Consent to Termination of Parental Rights of Adoption (Cont'd)

- Any consent given prior to, or within ten days after, birth of the Indian Child shall not be valid. ICWA, § 1913(a).
- Consent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent. ICWA § 1913(c).

Tribe's preferences for placement shall be applied by State Court Judge in adoptions.

- Tribes may establish different orders of preferences by resolution “so long as the placement is the least restrictive setting appropriate to the particular needs of the child.” ICWA § 1915(c).



State judges shall apply social and cultural standards of Indian community in adoptive placements.

- “The standards to be applied in meeting the preferences requirements. . . shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.” ICWA § 1915(d).

Pascua Yaqui statutory preferences in adoption cases.

- Extended family members and godparents;
- Person who has a relationship with the child but is not related;
- A tribal member or person eligible for tribal membership of the same Tribe;
- Other Indian persons; and,
- Any other person who meets the requirements of the child/adoptee and can provide a suitable home.
- 3 PYTC § 2-6-380, **Adoption Preferences.**

Pascua Yaqui Foster care placement preferences

- A local Yaqui extended family member, including brother, sister, aunt, uncle, grandparent, 1st cousin, 2nd cousin, or godparent;
- A local non-related Yaqui family;
- A local Indian family;
- A non-local, Yaqui extended family member;
- A non-local, non-Yaqui extended family;
- A non-local Yaqui family;
- A non-local Indian family; and,
- A non-local, non-Indian family. 5 PYTC § 7-210
- **Placement Policy in dependency cases.**

Placement preferences may not apply in certain cases.

- [Pascua Yaqui] Placement preferences are effective for temporary and permanent placements, including foster care, permanent guardianship, and adoption placements. 5 PYTC § 7-210(3).
- Placement preferences do not apply to court-ordered institutional care. *Id.*, at § 7-210(4).
- If Yaqui children are placed with non-Yaqui placement families, the children may still have access to the Yaqui extended family to include phone calls, visitations, and correspondence. *Id.* At (2)(a).

Involuntary proceedings and notice

- ICWA requires that notice be given to the parent or Indian custodian and the child's tribe by registered mail, return receipt requested, "where the Court knows or has reason to know that an Indian child is involved. . . ." 25 U.S.C. § 1912. An adoptive placement after an involuntary proceeding is an involuntary proceeding and notice to the Tribe of both termination and adoption is required.

Many Tribal codes do not support termination of parental rights.

- “Termination of the parent/child relationship is of such vital importance that it should only be used as a last resort when, in the opinion of the Court, all efforts have failed to avoid termination and it is in the best interests of the child and family concerned.” 5 PYTC § 7-410. **Involuntary termination.**

Many Tribes have open adoption laws.

- “The purpose of such open adoptions is not to permanently deprive the child of connections to, or knowledge of, the child’s natural family. The purpose of adoption shall be to give the adoptive child a permanent home.” 5 PYTC § 7-430. **Open Adoptions.**

Tribal Open Adoptions

- Allows a child . . . “an absolute right, absent a convincing and compelling reason to the contrary, to information and knowledge about his natural family and his tribal heritage.”
 - An open adoption “shall not serve to prevent an adoptive child from inheriting from a natural parent in the same manner as any other natural child.”
 - An adoptive child shall be entitled to inherit from adoptive parents and vice versa in the same manner as if natural parents and child. 5 PYTC § 7-44o(B)&(D).
- Open Adoptions.**